Berjasa Information System Sdn Bhd v Tan Gaik Leong (t/a Juruukur Berjasa) & Anor

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(W)-429–03 OF 2016
TENGKU MAIMUN, PRASAD ABRAHAM AND HARMINDAR SINGH JJCA
8 NOVEMBER 2016

B

C

Civil Procedure — Appeal — Assessment of damages — Deputy registrar dismissed appellant's application for directions for assessment of damages under O 37 r 1(1) of the Rules of Court 2012 ('the ROC') — Deputy registrar's decision affirmed by judge in chambers — Whether O 37 r 1(1) of the ROC should be applied retrospectively to judgment obtained by appellant — Rules of Court 2012 O 37 r 1(1)

D

The appellant had obtained a judgment against the respondents on 7 February 2007 ('the judgment') where the High Court ordered, inter alia, for damages to be assessed. Subsequently on 20 May 2014, the appellant, vide a notice of application under O 37 r 1(1) of the Rules of Court 2012 ('the ROC'), had sought for directions for the assessment of damages pursuant to the judgment. The learned deputy registrar dismissed the application and on appeal, the decision was affirmed by the judge in chambers. The learned judicial commissioner ('the JC') held that the ROC was a subsidiary legislation purely on procedure, thus, it applied retrospectively. His Lordship concluded that the failure of the appellant to adhere to the time period of one month provided under O 37 r 1(1) of the ROC, coupled with absence of any application for extension of time, was fatal to the application. The present action was an appeal by the appellant against the learned JC's decision. The issue arose was whether O 37 r 1(1) of the ROC should be applied retrospectively to the judgment obtained by the appellant on 7 February 2007.

E

F

G

Held, allowing the appeal and directing that the matter be remitted to the deputy registrar of the High Court for the hearing of the appellant's application for directions for assessment of damages:

H

(1) When the appellant obtained judgment against the respondents on 7 February 2007, there was no period prescribed for the appellant to commence the assessment of damages. The appellant had the substantive rights under the judgment and to held that O 37 r 1(1) of the ROC had a retrospective effect would result in unfairness, as it would impair the appellant's existing rights under the said judgment (see para 25).

I

(2) The appellant was correct to make the application under ROC as the Rules of the High Court 1980 were no longer in existence. In that aspect, the ROC was to be applied retrospectively, ie in relation to the manner in which the appellant should proceed with the assessment of damages. However, in relation to preserving the rights of the appellant under the judgment, the ROC should be applied prospectively. Thus, the appellant's failure to apply for an extension of time to pursue the assessment of damages was of no significance (see para 27).

[Bahasa Malaysia summary

Perayu telah memperoleh penghakiman terhadap responden-responden pada 7 Februari 2007 ('penghakiman tersebut') di mana Mahkamah Tinggi telah memerintahkan, antara lain, untuk ganti rugi ditaksirkan. Berikutan itu pada 20 Mei 2014, perayu, melalui notis permohonan di bawah A 37 k 1(1) Kaedah-Kaedah Mahkamah 2012 ('KKM'), telah memohon arahan untuk taksiran ganti rugi menurut penghakiman tersebut. Timbalan pendaftar yang bijaksana telah menolak permohonan itu dan atas rayuan, keputusan itu telah disahkan oleh hakim dalam kamar. Pesuruhjaya kehakiman yang bijaksana ('PK') telah memutuskan bahawa KKM merupakan perundangan subsidiari semata-mata tentang prosedur, oleh itu, ia terpakai secara kebelakang. Yang Arif membuat kesimpulan bahawa kegagalan perayu mematuhi tempoh masa satu bulan yang diperuntukkan di bawah A 37 k 1(1) KKM, bersama ketiadaan apa-apa permohonan untuk lanjutan masa, adalah memudaratkan kepada permohonan itu. Tindakan ini adalah rayuan oleh perayu terhadap keputusan PK yang bijaksana. Isu yang timbul adalah sama ada A 37 k 1(1) KKM terpakai secara kebelakang kepada penghakiman yang diperoleh oleh perayu pada 7 Februari 2007.

Diputuskan, membenarkan rayuan dan mengarahkan agar perkara tersebut diremitkan kepada timbalan pendaftar Mahkamah Tinggi untuk perbicaraan permohonan perayu bagi arahan untuk taksiran ganti rugi:

(1) Apabila perayu memperoleh penghakiman terhadap responden-responden pada 7 Februari 2007, tidak terdapat tempoh yang ditetapkan untuk perayu memulaan taksiran ganti rugi. Perayu mempunyai hak substantif di bawah penghakiman itu dan untuk memutuskan bahawa A 37 k 1(1) KKM mempunyai kesan kebelakang akan mengakibatkan ketidakadilan kerana ia akan menjejaskan hak sedia ada perayu di bawah penghakiman tersebut (lihat perenggan 25).

(2) Perayu adalah betul untuk membuat permohonan di bawah KKM kerana Kaedah-Kaedah Mahkamah Tinggi 1980 tidak wujud lagi. Dalam aspek itu, KKM hendaklah terpakai secara kebelakang, iaitu

berkaitan cara perayu patut meneruskan taksiran ganti rugi. Walau bagaimanapun, berkaitan mengekalkan hak-hak perayu di bawah penghakiman itu, KKM hendaklah terpakai secara retrospektif. Oleh itu, kegagalan perayu untuk memohon lanjutan masa bagi meneruskan taksiran ganti rugi adalah tidak penting (lihat perenggan 27).]

Notes

For cases on assessment of damages, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1104–1113.

Cases referred to

CCM Chemical Sdn Bhd v Glovco (M) Sdn Bhd [2013] MLJU 1607; [2013] 1 LNS 665, HC (refd)

Govalan a/l Arujuna v Pengerusi, Lembaga Pencegahan Jenayah & Ors [2015] MLJU 1233; [2016] 1 CLJ 772, HC (refd)

RHB Bank Bhd v Ya' akob bin Mohd Khalib@ Abdul Ghani bin Muhammad [2008] 1 MLJ 157, CA (refd)

Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292; [1995] 1 CLJ 491, CA (refd)

Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd [2012] 7 MLJ 597, HC (refd)

UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case [2015] 11 MLJ 499, HC (refd)

Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1, PC (folld)

Legislation referred to

Bankruptcy Act 1967 s 8, 8(2), 8(2A)
Rules of Court 2012 O 37 r 1(1)
Rules of the High Court 1980 O 29, O 37 r 1(1)

Appeal from: Suit No D4–22–1194 of 1997 (High Court, Kuala Lumpur)

Kan Weng Hin (Joel Lim Phan Hong and Nur Muhaimin bt Mohd Husaimi with him) (WH Kan) for the appellant.

Patrick Dass (Franklin Goonting with him) (Lim Soh & Goonting) for the respondents.

Tengku Maimun JCA (delivering judgment of the court):

[1] This was an appeal against the decision of the learned judicial commissioner ('JC') in affirming the order of the deputy registrar that the appellant's application for directions for assessment of damages be dismissed.

A THE BACKGROUND FACTS

[2] On 7 February 2007, the appellant ('the plaintiff') obtained a judgment against the respondents ('the defendants') where the High Court ordered, inter alia, for damages to be assessed.

B

[3] Dissatisfied with the judgment, the defendants appealed to this court. On 24 November 2010, the appeal was dismissed and the defendants' application to the Federal Court for leave to appeal against the order of this court was also dismissed on 31 October 2012.

C

[4] On 20 May 2014, vide a notice of application filed pursuant to O 37 r 1(1) of the Rules of Court 2012 ('the application'), the plaintiff sought for directions for the assessment of damages pursuant to the judgment.

D

[5] When the application came up for hearing before the learned deputy registrar on 20 May 2015, learned counsel for the defendants raised a preliminary objection that the plaintiff's application was out of time as it exceeded the one month period stipulated under O 37 r 1(1) of the Rules of Court 2012.

E

[6] The learned deputy registrar upheld the objection of the defendants. The application was accordingly dismissed with no order as to costs. Aggrieved, the plaintiff filed an appeal to the judge in chambers.

F

APPEAL TO THE JUDGE IN CHAMBERS

[7] Before the learned JC, the issue was limited to the preliminary objection, namely whether the plaintiff's application for directions for assessment of damages was properly made since it was filed more than one month from the date of obtaining the judgment.

G

[8] For the plaintiff, it was submitted that since the judgment was obtained on 7 February 2007, O 37 r 1(1) of the Rules of Court 2012 was not applicable. What was applicable was O 37 r 1(1) of the Rules of the High Court 1980, which did not stipulate the one month period as required by the current provision in the Rules of Court 2012. It was contended by the plaintiff that O 37 r 1(1) of the Rules of Court 2012 cannot apply retrospectively against a substantive right already obtained by the plaintiff in the judgment.

H

I

[9] The defendants on the other hand submitted the following:

(a) the applicable law should be the current provision in the Rules of Court 2012 and not the Rules of the High Court 1980;

(b) there was no affidavit to explain the delay by the plaintiff;

(c) there was also no extension of time applied for by the plaintiff; and

(d) the application itself was premised on the Rules of Court 2012 and not on Rules of the High Court 1980.

[10] The learned JC found favour with the submission of the defendants. His Lordship held that the Rules of Court 2012 is a subsidiary legislation purely on procedure and since it is on procedure, the Rules of Court 2012 applies retrospectively. In support of his finding, the learned JC cited the following authorities:

(a) *Govalan a/l Arujuna v Pengerusi, Lembaga Pencegahan Jenayah & Ors* [2015] MLJU 1233; [2016] 1 CLJ 772;

(b) *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292; [1995] 1 CLJ 491;

(c) *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case* [2015] 11 MLJ 499;

(d) *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd* [2012] 7 MLJ 597; and

(e) *CCM Chemical Sdn Bhd v Glovco (M) Sdn Bhd* [2013] MLJU 1607; [2013] 1 LNS 665.

[11] The learned JC further held that since the plaintiff itself had elected to use the Rules of Court 2012 to make the application, the plaintiff must follow the current provision in the Rules of Court 2012. His Lordship opined that as the plaintiff was late by more than seven years since obtaining the judgment, the plaintiff must apply for an extension of time which the plaintiff has failed to do.

[12] His Lordship concluded that the failure of the plaintiff to adhere to the time period of one month, coupled with the absence of any application for extension of time, was fatal to the application. The deputy registrar's decision was thus upheld. The plaintiff's appeal was accordingly dismissed with costs, hence the appeal before us, which we had unanimously allowed for the reasons that follow.

A THE APPEAL

[13] We do not propose to set out the respective submissions, suffice to state that the appeal concerned O 37 r 1(1) of the Rules of Court 2012 which came into effect on 1 August 2012 and which reads:

B

1 *Assessment of damages by Registrar (O 37, r 1)*

(1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment shall, within one month from the date of the judgment, apply to the Registrar for directions and the provisions of Order 34 shall, with the necessary modifications, apply.

C

[14] The issue for our consideration was whether O 37 r 1(1) of the Rules of Court 2012 should be applied retrospectively to the judgment obtained by the plaintiff on 7 February 2007.

D

OUR FINDINGS

E **[15]** Whilst we agreed with the learned JC that the Rules of Court 2012 is a procedural law, we disagreed that simply because the Rules of Court 2012 concern procedural law, it must be applied retrospectively to the judgment dated 7 February 2007.

F **[16]** In this regard, we found that the learned JC failed to consider the full effect of the case of *Sim Seoh Beng* cited by him.

[17] *Sim Seoh Beng* dealt with the issue whether the amendment to O 29 of the Rules of the High Court 1980 which came into effect on 1 October 1993 and which provides for the automatic lapse of an injunction order at the end of two weeks from the date on which it was granted, applies retrospectively to an injunction order dated 11 March 1993 (prior to 1 October 1993, the injunction order would continue until set aside on the merits and not lapse by mere effluxion of time).

G

H

[18] This court in *Sim Seoh Beng* held that the amendment introduced to O 29 of the Rules of the High Court 1980 should not be construed as retrospective provisions. For ease of reference, we will reproduce in extenso the judgment of Gopal Sri Ram JCA (as he then was) where at pp 296–297, His Lordship said:

I

The traditional approach to the interpretation of statutes (which includes subsidiary legislation such as the Rules of the High Court 1980) in this area is contained in the general rule that, in the absence of express words or necessary implication, statutes affecting substantive rights are prospective while those affecting procedure are retrospective. In the case of rules of court, there is a rider to the general proposition. It is this. A rule of court should not be given an interpretation that would result in unfairness or produce a manifest injustice: *Bank of America v Chai Yen* [1981] 1 MLJ 198 at p 199 ...

...

The classification of a statute in general terms as procedural or substantive is singularly unhelpful; for a statute may at once be procedural for one purpose and substantive for another, depending upon the context in which it is being construed: *Maxwell v Murphy* (1957) 96 CLR 261; *In the Estate of Fuld (No 3)* [1968] P 675 at p 695; [1965] 3 All ER 776 at p 779; [1966] 2 WLR 717 at p 734 per Scarman J; *Re Dosabhai Ardeshir Cooper* (1950) 52 Bom LR 625. It calls for a construction of the statutory provision as a whole: *Ramanathan Chettiar v Lakshmanan Chettiar* [1963] 1 Mad LJ 46 at p 50.

In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, prima facie that law must be construed as having prospective effect only, unless there is clear indication in the enactment that is in any event to have retrospectivity. Contra, where the written law does not affect substantive rights.

[19] The learned JCA further said at pp 297–298:

We derive support for the view that we have expressed from the decision of the Privy Council in *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 AC 553 (also reported in [1983] 1 MLJ 1). It was not referred to by either side to the learned judge in the present case. Neither is it mentioned in the *Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd & Ors* [1994] 1 MLJ 704 which commended itself to the judge and appears to have greatly influenced him in coming to the conclusion that he did.

In *Yew Bon Tew*, the plaintiff was injured in a collision involving the defendant's vehicle. The accident occurred on 5 April 1972. The relevant time limit for instituting proceedings against the defendant was prescribed by s 2 of the Public Authorities Protection Ordinance 1948. As at the date of the collision, the section provided a period of 12 months. The plaintiff did not commence any action within the prescribed period. On 5 June 1974, that is to say a little more than two years after the collision and about a year after time had run against the plaintiff, Parliament enacted an amendment to the principal statute, extending the period of limitation to 36 months. On 20 March 1975, the plaintiff issued writ claiming damages for the injuries received by him in the collision of 5 April 1972. At the trial, the defendant raised a preliminary objection on the maintainability of the action. Mohd Azmi J ruled in the plaintiff's favour. The defendant appealed to the Federal Court which allowed the appeal and dismissed the suit. The plaintiff then appealed to the Privy Council which upheld the Federal Court and dismissed the appeal.

Because of its importance, it is necessary to refer in extenso to the advice of the Board which was on that occasion delivered by Lord Brightman. This is what he said ([1983] 1 AC 553 at pp 558–559; [1983] 1 MLJ 1 at pp 2–3):

> A statute of limitation may be described either as procedural or as substantive. For example, in English law, at the expiration of the period prescribed for any person to bring an action to recover land, the title of that person to the land is extinguished. Such a limitation therefore goes to the cause of action itself. In most cases however the English Limitation Act only takes away the remedies by action or by set-off; it goes only to the conduct of the suit; it leaves the claimant's right otherwise untouched in theory so that, in the case of a debt, if the statute-barred creditor has any means of enforcing his claim other than by action or set-off, the Act does not prevent his recovering by those means. In this sense, the Ordinance of 1948 and the Act of 1974 are procedural: cf *Harris v Quine* (1896) LR 4 QB 653 and *Rodriguez v RJ Parker (Male)* [1967] 1 QB 116.

Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (eg because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (eg because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself. (Emphasis added.)

Later in his judgment he reiterated ([1983] 1 AC 553 at p 563; [1983] 1 MLJ 1 at p 5):

> *Their Lordships consider that the proper approach to the construction of the Act of 1974 is not to decide what label to apply to it, procedural or otherwise but to see whether the statute, if applied retrospectively in a particular type of case, would impair existing rights and obligations.* (Emphasis added.)

I have laid emphasis on these last two passages because in them is the key to the whole problem that is now under investigation. It is an approach that was overlooked by the judge in the instant case.

[20] The same issue was canvassed in *RHB Bank Bhd v Ya'akob bin Mohd Khalib@ Abdul Ghani bin Muhammad* [2008] 1 MLJ 157, in relation to

sub-s (2A) of s 8 of the Bankruptcy Act 1967, which came into force on 17 July 1992.

[21] In *RHB Bank Bhd*, the respondent (the defendant) charged his land to the appellant (the plaintiff) as security for an overdraft facility. The charge was registered on 29 December 1986. The defendant defaulted in payment and on 30 September 2002, the plaintiff applied for an order for sale of the defendant's property. The plaintiff claimed that the defendant owed the sum of RM116,774.89 which was made up of a principal sum of RM20,000 and the balance being interest on the principal sum.

[22] On 17 May 2004, ie the hearing date of the application for the order for sale, the court was informed that the defendant was made a bankrupt on 24 November 1986. The High Court judge granted the order for sale but he also decided that the amount due to the plaintiff was only the principal sum of RM20,000. The plaintiff's claim for the interest on the principal sum was disallowed by virtue of s 8(2A) of the Bankruptcy Act 1967.

[23] Subsection (2) and (2A) of s 8 of the Bankruptcy Act 1967 provides:

> (2) This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed – nor shall it operates to prejudice the right of any person to receive any payment under or by virtue of the provisions of s 31 of the Employment Act 1955 of the States of West Malaysia or any corresponding provisions in Sabah and Sarawak.
>
> (2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.

[24] The plaintiff appealed to this court against the order of the High Court in disallowing its claim for payment of interest on the principal sum. This court referred to *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 and held that sub-s (2A) of s 8 of the Bankruptcy Act did not have a retrospective effect. In allowing the appeal, Hasan Lah JCA (now FCJ) said at p 162:

> [12] In the instant case by virtue of sub-s (2) of s 8 of the Bankruptcy Act the plaintiff had acquired a right as a secured creditor to realise its security when the land was charged to the plaintiff on 29 December 1986. As such the law applicable to the plaintiff was the law as it was on 29 December 1986. Subsection (2A) which was introduced by the Bankruptcy (Amendment) Act (Act A827) and which came into force on 17 July 1992 could not, therefore, take away the plaintiff's accrued right under s 8(2) as the amending Act did not clearly and specifically provide that sub-s (2A) would have a retrospective effect. It was therefore not intended to have

a retrospective effect. To read otherwise it would produce an unjust result as that sub-s (2A) deals with a substantive right.

[25] Coming back to the present appeal, when the plaintiff obtained judgment against the defendants on 7 February 2007, there was no period prescribed for the plaintiff to commence the assessment of damages. Applying the principles laid down by the Privy Council in *Yew Bon Tew* which were applied by this court in *Sim Seoh Beng*, and *RHB Bank Bhd*, the plaintiff had the substantive rights under the judgment and to hold that O 37 r 1(1) of the Rules of Court 2012 had a retrospective effect would result in unfairness, as it would impair the plaintiff's existing rights under the said judgment.

[26] As for the contention that the plaintiff must follow O 37 r 1(1) of the Rules of Court 2012 because the plaintiff itself has cited Rules of Court 2012 in its application, the answer is found in the passage quoted from *Yew Bon Tew* above, namely that 'A statute which is retrospective in relation to one aspect of a case … may at the same time be prospective in relation to another aspect of the same case'.

[27] In our judgment, the plaintiff was correct to make the application under Rules of Court 2012 as the Rules of the High Court 1980 were no longer in existence. In that aspect, the Rules of Court 2012 was to be applied retrospectively, ie in relation to the manner in which the plaintiff should proceed with the assessment of damages. However, in relation to preserving the rights of the plaintiff under the judgment, the Rules of Court 2012 should be applied prospectively. Flowing from the aforesaid, we were of the view that the plaintiff's failure to apply for an extension of time to pursue the assessment of damages was of no significance.

CONCLUSION

[28] Premised on all the above, we were unanimous in our view that the learned JC erred in merely confining himself to whether O 37 r 1(1) of the Rules of Court 2012 was purely on procedure without considering further whether it would affect the substantive rights of the plaintiff, if applied retrospectively. Put another way, the learned JC erred in failing to undertake the approach as guided by the Privy Council in *Yew Bon Tew*.

[29] We therefore allowed the appeal and directed that the matter be remitted to the deputy registrar of the High Court for the hearing of the plaintiff's application for directions for assessment of damages.

Appeal allowed; matter directed to be remitted to deputy registrar of High Court for the hearing of appellant's application for directions for assessment of damages.

Reported by Dzulqarnain Ab Fatar